

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE  
(PPA) PRODUCTS LIABILITY  
LITIGATION,

MDL NO. 1407

ORDER DENYING PLAINTIFF'S  
MOTION TO SUBSTITUTE AND  
GRANTING DEFENDANT'S MO-  
TION TO DISMISS

This document relates to:  
*Gillespie v. Wyeth, C03-3616*

This matter comes before the court on defendant Wyeth's motion to dismiss pursuant to Fed. R. Civ. P. 25 and on plaintiff's motion to substitute. Having considered the motions, the court finds and rules as follows:

This case was originally filed on December 30, 2002. Plaintiff Mae Francis Gillespie passed away on February 7, 2004. On March 22, 2005, defendant filed a suggestion of death pursuant to Fed. R. Civ. P. 25, triggering plaintiff's obligation to file a motion to substitute a new plaintiff within 90 days. Plaintiff did not do so until July 6, 2005, approximately a week after the June 27, 2005 deadline and after Wyeth filed the instant motion to dismiss.

Wyeth now seeks dismissal of plaintiff's claims for her failure to comply with the Fed. R. Civ. P. 25 deadline. That rule

1 provides, in relevant part, "[u]nless the motion for substitution  
2 is made not later than 90 days after the death is suggested upon  
3 the record . . . the action shall be dismissed as to the deceased  
4 party."

5 While plaintiff represents that the putative substitute -  
6 plaintiff's sister - is in the process of being appointed legal  
7 representative of plaintiff's estate, she submits no proof that  
8 such appointment has yet taken place. The court has in the past  
9 found that the intent to become legal representative is an  
10 inadequate substitute for actual legal representative status.  
11 See, e.g., *Craven v. Wyeth*, C03-3811, July 25, 2005, Order  
12 Denying Plaintiff's Motion for Substitution. Plaintiff's sister  
13 is simply ineligible to be substituted for plaintiff, and the  
14 motion to substitute is therefore denied.

15 Plaintiff also argues that Fed. R. Civ. P. 6 provides for an  
16 enlargement of the 90-day period upon a showing of excusable  
17 neglect. Plaintiff has failed, however, to demonstrate that the  
18 conceded neglect of counsel and counsel's staff was excusable, or  
19 indeed provide any explanation at all.<sup>1</sup> Under Fed. R. Civ. P. 25,  
20 the court "*shall*" dismiss an action where plaintiff has failed to  
21 file a timely motion to substitute after death (emphasis added).  
22 In the absence of a showing of excusable neglect or other ratio-

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24 <sup>1</sup>The affidavit offered in purported excuse merely avers that  
25 plaintiff's counsel's paralegal misplaced Wyeth's motion to  
26 dismiss. It is unclear in which way this excuse relates to  
plaintiff's failure to timely substitute.

1 nale for an exception to the rule, the court is left without  
2 discretion. This matter is therefore dismissed.

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4 DATED at Seattle, Washington this 22nd day of November,  
5 2005.

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7 BARBARA JACOBS ROTHSTEIN  
8 UNITED STATES DISTRICT JUDGE  
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